MOTION FILED
DEC 21 1978

Supreme Court, U. S.
FILED
DEC 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-983, 78-119 and 78-139

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

BRIEF OF *AMICUS CURIAE* PACIFIC SEAFOOD PROCESSORS ASSOCIATION

PAUL W. STEERE OF
BOGLE & GATES
Attorney for Amicus Curiae, Pacific Seafood Processors Association

Of Counsel
Ronald T. Schaps

Office and Post Office Address:
22nd Floor, Bank of California Center
Seattle, WA 98164
Telephone (206) 682-5151

CRAFTSMAN & MET PRESS — SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE	1
BRIEF AMICUS CURIAE	4
Interest of Amicus	4
Introduction	4
Summary of Argument	6
Argument	7
I. The District Court and Circuit Court Decisions Are Unsupportable by the Authorities, Treaty Language, Findings of Fact or Logic	7
II. Federal Enforcement of the Treaties as Presently Interpreted Would be Inconsistent With the Fishery Conservation and Management Act of 1976	15
III. The Present Interpretation and Application of the Treaty Language Is Unconstitutional	17
Conclusion	21

TABLES OF AUTHORITY

Table of Cases

Choctaw Nation of Indians v. United States, 318 U.S. 432 (1943) 13, 14

Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) 21

Department of Game v. The Puyallup Tribe, 414 U.S. 44 (1973) 9, 13

Geer v. Connecticut, 161 U.S. 519 (1896) 9

Geofray v. Riggs, 133 U.S. 258 (1890) 17

Martin v. Lessee of Waddell, 16 Pet. 367 (1842) 9, 18

McCready v. Commonwealth of Virginia, 94 U.S. 391 (1877) 9

Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 (1945) 14-15

Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) 13

	Page
Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977)	13
Reid v. Covert, 354 U.S. 1 (1957)	17
Smith v. Maryland, 18 How. 71 (1855)	9
Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948)	9, 19
Toomer v. Witsell, 334 U.S. 385 (1948)	9, 19
United States v. Choctaw Nation, 179 U.S. 494 (1900)	14
United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)	5, 10

Constitutional Provisions

U.S. Const. amend. V	21
U.S. Const. amend. XIV	19, 21

Statutes

Enabling Act of 1889, 25 Stat. 676	18
Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 *et seq.*	6, 11
16 U.S.C. § 1802(18)	15
§ 1811	15
§ 1812	15
§ 1851(a)	15-16
§ 1856	16
Indian Citizenship Act, 43 Stat. 253	19

Other Authorities

1976 U.S. Code, Cong. Adm. News, Vol. 2, Legislative History at 602	11
Webster's American Dictionary of the English Language (1828 ed.)	8, 9
Webster's American Dictionary of the English Language (1862 ed.)	8

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF PACIFIC SEAFOOD PROCESSORS ASSOCIATION

This motion of the Pacific Seafood Processors Association for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42. Consent to the filing of this brief has been granted by counsel for petitioner State of Washington, petitioner/respondent Puget Sound

Gillnetters Association, petitioner/respondent, Purse Seine Vessel Owners Association, respondent, Washington State Commercial Passenger Fishing Vessel Association, and respondent United States. Consent has been withheld by the Indian tribes who are parties.

Pacific Seafood Processors Association is an association of canners and processors of seafood, including salmon, in the case area. Individual processors engage in commercial canning and packing, buying fish for their own account, or provide canning and processing services for others. The association's members buy fish from both Indian and non-Indian fishermen.

The pacific salmon is one of the nation's most valuable fish resources. The association and its members are obviously vitally concerned about the preservation and enhancement of the commercial qualities and value of that fishery. They have a vital interest in the receipt at their respective facilities of fish of adequate quality and quantities, and receipt of these fish in an orderly and non-wasteful manner. The members are also concerned with the preservation of the free market conditions affecting or which may affect the supply and cost of fish for processing.

The parties of record deal with the issues in this case essentially in the context of their interests, fisheries management and the competing interests of the fishermen themselves. Pacific Seafood Processors Association is concerned that the broader impacts of these issues on other industrial segments and the community at large be expressed.

Pacific Seafood Processors Association requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

PAUL W. STEERE OF
BOGLE & GATES

Of Counsel:
Ronald T. Schaps

Attorneys for Amicus Curiae, Pacific Seafood Processors Association

December, 1978.

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF *AMICUS CURIAE* OF PACIFIC SEAFOOD PROCESSORS ASSOCIATION

INTEREST OF *AMICUS*

The interest of *amicus* is set forth in the preceding motion for leave to file this brief.

INTRODUCTION

The facts of this case as set forth in detail in the opening briefs of the State of Washington, Puget Sound Gillnetters Association, Purse Seine Vessel Owners Association and Washington State Commercial Passenger Fishing

Vessel Association are hereby adopted. However, certain salient points should be emphasized to show the extreme nature of the interpretation placed upon the Stevens treaties by the federal courts below:

1. The commercial salmon industry as it developed prior to the initial decision in *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (the "Boldt decision"), was predominantly a marine fishery, with the initial exploitation by ocean trolling, followed by net fishing in the Straits of Juan de Fuca and the waters of Puget Sound.

2. The treaty Indians engaged in little marine fishing and their accustomed grounds and stations were generally rivers and marine terminal areas (those areas near the mouth of a river).

3. Under the Boldt decision, the treaty Indians (.028% of the population IN THE CASE AREA) are given a permanent inheritable right to all of the salmon they can catch on their reservations; all of the salmon they claim for subsistence purposes; all of the salmon they catch for ceremonial purpose; and 50% of all remaining harvestable fish, to be caught at their accustomed grounds and stations. *In addition*, the treaty Indians are permitted to engage freely in all sport and commercial fishing permitted to non-treaty citizens.

4. The catch of treaty Indians who engage in the non-treaty fisheries is not to be considered part of their treaty share. In practical effect, their catch is to be deducted from the number of salmon non-treaty citizens are to be permitted to catch.

5. In order to guarantee that the treaty Indians catch their allotted number (in excess of 50%) of fish from each

run at their accustomed grounds and stations, non-treaty commercial and sports fishing is to be restricted and curtailed on the earlier marine phases of the run.

6. Under the Boldt decision, as modified on appeal, salmon caught beyond the State's three-mile limit are to be deducted from the non-treaty citizens' share if caught by a Washington resident or if landed in Washington.

SUMMARY OF ARGUMENT

It is the position of *amicus* that the difficulties that have been incurred stem from a fundamental error in the federal decisions below; namely, the adoption of a quantified ownership concept in measuring Indian rights under the Stevens treaties. This has led to a most awkward and discriminatory interpretation of the Stevens treaties, with an aftermath of serious confusion and civil dissention. The federal courts below have not dealt with the situation as one calling for the application of equal protection principles in the context of a common fishery.

The arguments of *amicus* can be summarized in the following three points:

1. The District Court and Circuit Court decisions as to the meaning of the treaty language are unsupportable by the authorities, treaty language, Findings of Fact or logic.

2. Federal enforcement of the treaties as presently interpreted would be inconsistent with the Fishery Conservation and Management Act of 1976.

3. The present interpretation and application of the treaty language is unconstitutional.

ARGUMENT

I. The District Court and Circuit Court Decisions are Unsupportable by the Authorities, Treaty Language, Findings of Fact or Logic

The different Stevens treaties all use substantially the same language:

> The *right of taking* fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians, *in common with all citizens*. . . .

(Emphasis supplied)

Except for these reserved rights, the Indians ceded sovereignty over all lands and waters outside their reservations. They reserved no rights to fish other than at their "usual and accustomed grounds and stations", agreed that non-Indians could fish in common with them at their usual and accustomed fishing grounds and placed no restrictions on the non-Indians' use of ceded lands and waters or access to the common fisheries.

The district court expressly found that the Treaty Indians understood the restrictive nature of "usual grounds and stations" (F.F. 24, Joint App. 11-112), and made further findings that the Indians understood that fish were neither guaranteed nor exclusively theirs.

> . . . the Indian's harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of Indian fishing gear.

(F.F. 5, Joint App. 101)

. . . George Gibbs noted that:

> As regards the fisheries, they are held in common and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties. as the Indians move about, on the sound particularly, from one to another locality, according to the season.

(F.F. 13, Joint App. 105)

> . . . The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but the white man would also be allowed to fish . . .

(F.F. 20, Joint App. 109)

> . . . there is no evidence at the time of the treaties that either party intended to restrict the other party's fishing . . .

(F.F. 28, Joint App. 113)

Conversely, there was no finding whatsoever that there was any Indian cultural concept or understanding of being entitled to own or catch any fixed quantum or proportion of fish.

Notwithstanding, the district court ruled, as a matter of law, that the words "in common with" give the Indians a permanent right to catch over 50% of the harvestable fish. The only basis for this ruling, other than a reliance on treaty interpretation rules which enjoin liberality, and the only legal precedent ever cited by the court or the plaintiffs for this startling interpretation of the treaty words "in common with" is a definition of the word "common" from 1828 and 1862 editions of Webster's American Dictionary of the English Language (F.F. 24, Joint App. 111). The full language of this definition reads:

> 1. 1. *Belonging equally to more than one, or to many indefinitely;* as life and sense are common to man and beast; *the common privileges of citizens;* the common wants of man. 2. *Belonging to the public; having no separate owner.* The right of a highway is common. 3. General; serving for the use of all . . .

1828 ed. Webster's American Dictionary of the English language. (Emphasis supplied)

The district court also held, contrary to established law, that fishing by non-Indians is a mere privilege, not a right, and as such is revocable at will. The significance of this premise in the framing of the district court's decision is that it facilitates the restriction and curtailment of the non-Indian's fishing rights and his access to the common fishery in state waters, with impunity and, we submit, without regard for constitutional protections.

The premise that a citizen's right to fish is a mere privilege is erroneous. *Martin v. Lessee of Waddell,* 16 Pet. 367 (1842); *Smith v. Maryland,* 18 Howard 71 (1855); *McCready v. Commonwealth of Virginia,* 94 U.S. 391 (1877); *Geer v. Connecticut,* 161 U.S. 519 (1896); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948). See also: *Department of Game v. The Puyallup Tribe,* 414 U.S. 44 (1973). As noted, there is nothing in the language of the treaties themselves or in the findings of fact to indicate any intent to treat the non-Indians' right to fish "in common" as inferior to the Indians or to permit the Indians, through the agency of the court, to impose or require restrictions on non-Indian fishing activities in the ceded territory. If anything, the record indicates that such positions were contrary to the understandings and cultural concepts of both parties to the treaties.

As previously noted, the district court also held that *in addition* to the 50% the Indians are also entitled to: 1. all the salmon they catch on their reservations; 2. all they catch for ceremonial purposes; 3. all they catch to eat; 4. all they catch as participants in the all-citizen fishery; plus 5. an "equitable" adjustment for the number of fish caught by non-Indians outside the jurisdiction of the state of Washington.

The Court of Appeals for the Ninth Circuit did not rule on the propriety of the district court's holding that the words "in common with", as a matter of law, entitled the Indians to 50% of all harvestable salmon and steelhead plus the various additional allotments. The court of appeals instead rested its affirmance on a theory of its own creation. It analogized the treaty language to a cotenancy in the fish and the litigation to a request for a partition. This application of "ownership" principles is foreign to cultural concepts and understandings of all parties to the treaties as established by the district court's findings of fact. Furthermore, the court of appeals failed to apply the same theory and standards of accountability to the Indians as "co-tenants" with regard to their fishing activities—particularly away from the usual and accustomed grounds and stations. *U.S. v. Washington*, 520 F.2d 676 at 687 (9th Cir. 1975).

Ultimately, the court of appeal's decision rests upon a purported affirmance of the district court's exercise of "discretion" so as to "best protect the interests of all parties, as well as those of the public". *U.S. v. Washington,* 520 F.2d 676 at 687 (9th Cir. 1975). In fact, the district court did not, and did not purport to, exercise any discretion—it ruled on the treaty language as a matter of law, relying

on a misapplied interpretation of a definition in an 1828 English language dictionary.

Aside from a somewhat paternalistic mention in Finding of Fact 29 that "fishing is also important to some non-Indians" (Joint App. 113) the findings of fact and opinion basically ignore the circumstances of the 99.72% of the citizens in the case area who are not Indians. Nowhere in the findings of fact or opinion—which deal at great length with the importance of salmon to the Indian—is there any adequate analysis of the importance of the salmon to the non-Indian or of the impact of the mandated closures and restrictions upon the non-Indian. There is no real recognition that the Pacific salmon is a treasured public resource, the most valuable fishery in the United States, of all floating fish; and no word that the Pacific salmon is a subject of intense international competition with aggressive fishing competitors as Japan, Russia and Korea, requiring the enterprise of American fishermen and sensitive international compacts, all exerted in our national interest.

Nor, is there any consideration or analysis of the impact of this treaty interpretation upon the processing and utilization of this important food resource, as a result of the modification of a predominantly marine commercial fishery, with staggered phases of harvesting, into one with greatly increased emphasis on a terminal area fishery.

Congress itself, in passing the Fishery Conservation and Management Act of 1976 (16 U.S.C. § 1801, *et seq.*), recognized the vulnerability of the United States' commercial fishing industry to destruction as a viable competitive factor. 1976 U.S. Code, Congressional and Administrative News, Vol. 2, Legislative History at pp. 602-606. When a

very small minority is given exclusive rights to over one-half of a fishery resource and the right to utilize their fishing capacity to compete with independent fishermen for the remaining allowable catch, it is just a matter of time until many, if not all, independent fishermen are driven out of the industry. The monopolization, or even substantial restraint, of the supply of salmon for commercial processing must, and will, adversely impact the processors, consumers and the community as a whole. The federal trial court's decision, based as it is upon a concept of an inheritable right to a permanent percentage of the catch, repudiates any mechanism or considerations which could permit adjustments to prevent such consequences.

The granting of a permanent ownership in anadromous fish, in excess of 50%, to tribal members is necessarily arbitrary and illogical. A quantified ownership bears no relationship to the number of Indians who actually fish, of all Indians, or to the number of Indians who fish compared with the number of non-Indians who fish, or to the number of Indians who fish now as compared to in 1855, or to the importance of fish in their livelihood now as compared to in 1855 or to any other standard. If but one single Indian remained he would still have a hereditary right to 50% plus of all fish in his ancestral fishing grounds, whether he fished or not. The fallacy here lies not in the selection of any particular percentage. It lies in deciding this question in terms of *any* permanent percentage, and in interpreting the language of the Stevens treaty in terms of ownership concepts which are foreign to the treaty language, established law and Indian cultural concepts.

It is significant to note that neither the district court nor the court of appeals analyzes this result from the stand-

point of equal protection principles which this Court has recognized as being required in the application of the specific language and treaties now before this Court.

> . . . [We] add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with"

Puyallup Tribe v. Department of Game, 391 U.S. 392 at 403 (1968).

> The case was remanded for determination of . . .
>
> "the issue of equal protection implicit in the phrase 'in common with'" as used in the Treaty.
>
> . . .
>
> What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the *rights of other people.*

(Emphasis supplied) *Department of Game v. Puyallup Tribe,* 414 U.S. 44 at 45, 48-49 (1973).

See also Puyallup Tribe v. Department of Game, 433 U.S. 165 at 177 (1977).

By injecting the concept of a quantified ownership of in excess of 50% of the fish, this case presents a classic example of adding wholly new provisions to an Indian treaty to ameliorate a claimed injustice. This Court has repeatedly held that such interpolations are improper. In *Choctaw Nation of Indians v. United States,* 318 U.S. 432 (1943), this Court, after acknowledging the liberal view of interpretation relied on below, went on to say, in reversing the lower

court decision which was based upon "findings" of Indian intent:

> But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. (Citing cases) . . .

318 U.S. at 432.

Also:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as an injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government . . . to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law.

United States v. Choctaw Nation, 179 U.S. 494 at 532-533 (1900).

Also:

> But the context shows that the Justice meant no more than the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress.

Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 at 353 (1945).

II. Federal Enforcement of the Treaties as Presently Interpreted Would be Inconsistent with the Fishery Conservation and Management Act of 1976

Congress has established a fishery conservation zone from the seaward boundary of each coastal state (3 miles) to a line 200 nautical miles into the ocean (16 U.S.C. § 1811) and has provided that the United States shall exercise exclusive fishery management authority in that zone (16 U.S.C. § 1812). The statute provides for fishery management plans to be developed by regional councils and establishes the following manadatory national standards:

> Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:
>
> (1) Conservation and management measures shall prevent over-fishing while achieving, on a continuing basis, optimum yield from each fishery.[1]
>
> . . .
>
> (4) Conservation and management measures *shall not discriminate between residents of different States.* If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, *such allocation shall* be (A) *fair and equitable* to *all* such fishermen; (B) reasonably calculated to promote

1. "Optimum" yield is defined in 16 U.S.C. § 1802 (18) as:

"The term 'optimum', with respect to the yield from a fishery, means the amount of fish–

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor."

> conservation; *and* (C) carried out in such manner that *no particular individual, corporation or other entity acquires an excessive share of such privileges.*

(16 U.S.C. § 1851(a), emphasis supplied.)

Congress carefully preserved the management jurisdiction of the States within their own boundaries unless a State has taken action, or omitted to take action, the results of which would adversely affect the fishery management plan. If, as here, the United States purports to assert control over state waters, its regulation within the state waters must comply with the fishery management plan—including the mandatory national standards quoted above (16 U.S.C. § 1856).

Congress has recognized the concept of a "common fishery", the rights of all citizens to exploit the common fishery without discrimination and under equal protection concepts, and the need to prevent the restraint and monopolization of this vital industry through undue concentration of fishing rights.

The district court's interpretation of these treaty rights is in conflict with these principles so recently enunciated and reaffirmed by Congress. It requires discrimination against residents of the State of Washington; it repudiates concepts of allocation on a basis fair and equitable to *all* fishermen; it places ownership of over 50% of the state's, ~~and the nation's,~~ most valuable fishery in the treaty tribes, who constitute less than one percent of the population, and hands to them the economic power to force many, if not all, non-treaty commercial fishermen out of the industry and to dominate that industry; it ignores all concepts of national and community benefit with regard to food production and recreational opportunities; and it effectively

repudiates as irrelevant all factors relating to over 99% of the population in the case area.

III. The Present Interpretation and Application of the Treaty Language is Unconstitutional

The Constitution of the United States is of course binding upon all branches of the government—legislative, executive and judicial. There is no doubt that treaty provisions must comply with or give way to the provisions of the U.S. Constitution:

> . . . It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of its states. . . .

Geofray v. Riggs, 133 U.S. 258 at 267 (1890).

> . . . There is nothing in this language [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . .

Reid v. Covert, 354 U.S. 1 at 16 (1957).

The federal decisions before this Court effectively deny non-treaty fishermen in the State of Washington constitutionally protected rights. Citizens and residents outside the State of Washington continue to assert and exercise, on a non-discriminatory basis, their right to exploit the common fisheries. Salmon off the western coast of the United States run in mixed stock—salmon caught in the ocean off the State of Washington are returning to spawning streams in California, Oregon, Washington and Canada. Conversely, salmon returning to spawning streams in the State of Washington are caught in ocean waters off the coasts of Alaska, Oregon, California and Canada by citizens and residents of those states and that nation. Citizens and residents of Alaska, Oregon and California continue

to enjoy their right to fish off the coast of Washington and to catch Washington spawned fish off the coasts of other states.

On an argument raised for the first time some 120 years after the signing of the treaties, based upon a unique interpretation of treaty language, the non-treaty citizens and residents of the State of Washington are now judicially restricted from equally exercising those same rights. As to these citizens and residents, there now exists a discriminatory restriction upon their use of the common fishery in order to make a permanent allocation of over 50% of the state's salmon and steelhead resources to a small (.028%) ethnic minority of the citizens of the state.

This is so in spite of the precept that all citizens of the state have:

> . . . a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and (may) not, without injury to their right, be restrained of it. . . .

Martin v. Lessee of Waddell, 16 Pet. 367 at 412 (1842).

Nowhere in the Enabling Act of February 22, 1889, 25 Stat. 676, under which Washington became a state, do the citizens disclaim or surrender their rights to the common fisheries, particularly of the marginal seas.[2] That Enabling Act declares that:

> . . . the proposed states . . . shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

(Section 8)

The right of all citizens, Indian and non-Indian alike, to participate in the common fisheries in the marginal seas

2. They disclaimed only title to the *lands* reserved to the Indians (Section 4, Second).

is subject to the protection of Art. IV, Section 2 and the Fifth and Fourteenth Amendments of the U.S. Constitution. *Toomer v. Witsell,* 334 U.S. 385 (1948); and *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948).

In *Toomer* this Court held:

> [W]e hold that commercial shrimping in the marginal seas . . . is within the purview of the privileges and immunities clause . . .

334 U.S. at 402-403.

In *Takahashi,* the plaintiff challenged a California statute which denied plaintiff the right to a commercial fishing license because, although he was a long-time resident and had been a commercial fisherman for 27 years, he was "a person ineligible to (United States) citizenship." The Court struck down the statute as being an unconstitutional deprivation of rights in violation of the Fourteenth Amendment.

> [Its supposed "ownership" of the fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing . . . while permitting all others to do so.

334 U.S. at 421.

It is to be noted that the treaty before this court, by use of the word "in common with", by its own expression repudiates the idea that it was intended to, or could, create discriminatory classifications.

At least since the adoption of the Fourteenth Amendment in 1865, and certainly since the enactment of the Indian Citizenship Act (43 Stat. 253), the Indian inhabitants of Washington have not only had the right to fish at their usual and accustomed places and on their reserva-

tions, but have also had the right to participate freely and equally with non-Indians in the common fishery on marginal seas. As noted, inhabitants of other states have also exercised rights to fish in the marginal seas of their states and in Washington waters, and, as the lower court recognized and found, they catch substantial numbers of salmon outside of Washington waters and jurisdiction which would otherwise have been available to inhabitants of this State. Salmon, being an anadromous fish, is no respector of state boundaries and fishermen fishing the marginal seas (Indian and non-Indian alike) catch salmon running in mixed stocks which would otherwise return to a number of different states or to Canada.

Yet, under the district court's ruling, the State is *required* to enact and enforce discriminatory fishing regulations directed against over 99% of the population in the case area and the State is ordered to divert fishery resources owned by all citizens so as to establish a monopoly control of well over 50% of those resources in the private hands of a small minority of its citizens. In addition, the State is required to permit this ethnic minority to compete freely with the majority of the citizens in exploiting the remaining fishery resources. If a member of a treaty tribe fishes in the all-citizen fishery, that individual's catch will not count toward the tribal off-reservation share but rather becomes a further reduction in the number of fish non-treaty citizens are to be permitted to catch.

In short, under the district court's treaty interpretation and rulings, which are strained and unnecessary in the first place, non-Indians in this state are deprived of privileges and immunities held by other citizens and deprived of the equal protection of the laws with regard to their access to

and utilization of the common fisheries on the marginal seas.

Obviously, the federal district court's assumption of direct regulation and control of fisheries would not eliminate any of the constitutional defects. The protections from state action to which the non-treaty citizens of the state are entitled under the Fourteenth Amendment are also guaranteed to those citizens, as to federal actions, under the Fifth Amendment. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977).

CONCLUSION

It is believed that this is one of the most important Indian treaty cases to be presented to this Court. A full review by this Court is necessary not only to correct errors on substantive issues but also to re-establish constitutional rights of non-treaty citizens and to re-establish the State of Washington in its proper role in the management and conservancy of a sensitive public resource.

Respectfully submitted,

PAUL W. STEERE OF
BOGLE & GATES
Attorneys for Amicus Curiae, Pacific Seafood Processors Association

Of Counsel:
Ronald T. Schaps

December, 1978.